

OCBC BANK (MALAYSIA) BHD*a***v.****EDEN ENTERPRISES (M) BHD**

HIGH COURT MALAYA, PENANG

b

RK NATHAN J

[CIVIL SUIT NO: 22-185-2000]

5 FEBRUARY 2002

CIVIL PROCEDURE: *Summary judgment - Setting aside - Credit facilities provided by foreign bank - Claim for repayment by local bank - Whether there was a triable issue*

c

The defendant was granted credit facilities by OCBC Singapore, a company incorporated in Singapore and a different corporate entity from the plaintiff. Subsequently, the plaintiff sued the defendant based on the credit facilities granted to the defendant. The plaintiff premised its right to proceed with the action based on a vesting order dated 24 June 1994 to which the defendant contended that the said vesting order was *ultra vires* the Banking and Financial Institutions Act 1989 ('the BAFIA'), and therefore ought to render the plaintiff devoid of a proper cause of action. The plaintiff also raised the issue of estoppel and argued that the defendant had, by conduct, acknowledged that the credit facilities granted by OCBC Singapore were maintained and managed by the plaintiff since the vesting order.

*d**e*

This was an appeal by the defendant against the decision of the senior assistant registrar in granting the plaintiff's application under O. 14 of the Rules of the High Court 1980 for a summary judgment.

*f***Held:**

[1] Section 49 of the BAFIA requires the sanction of the minister where a reconstruction of a licensed institution is involved. Section 4(a) of the same further requires the licensed institution to be a public company to carry on banking business. And under s. 4 of the Companies Act 1965, it ought to be incorporated pursuant to the Companies Act 1965 or pursuant to any corresponding previous enactment. (p 440 h)

g

[2] The defendant had succeeded in establishing a triable issue in the present matter in that it was arguable that OCBC Singapore was a licensed institution within the definition of s. 49(1)(b) of the BAFIA. (p 441 a)

h

[3] As for the question of estoppel by conduct raised by plaintiff, it is set law that the doctrine of estoppel cannot be applied to an Act of Parliament. (p 441 h)

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[Defendant's appeal to set aside summary judgment allowed with costs.]

a Case(s) referred to:

Barrow's case [1880] 14 Ch D 452 (*refd*)

Eu Finance Bhd v. Lim Yoke Foo [1982] 2 MLJ 37 (*refd*)

Veetak Enterprise Sdn Bhd v. Kuala Lumpur Finance Bhd [1987] 1 MLJ 407 (*refd*)

Legislation referred to:

- b** Banking and Financial Institutions Act 1989, ss. 2, 4(a), 5(1), 6(4), 49(1)(b), 50(3)
Companies Act 1965, s. 4

For the plaintiff/respondent - CK Ang; M/s Cheong Wai Meng & Van Buerle

For the defendant/appellant - Dato' Ms Murthi; M/s Murthi & Partners

- c** *Reported by M Maheswaran*

JUDGMENT**RK Nathan J:****Facts**

- d** The plaintiff bank sued the defendant based on various credit facilities granted to the defendant at the defendant's request. In its defence the defendant, amongst others, contended that the plaintiff had no cause of action. It was further averred in the defence that on 18 February 1991 OCBC Singapore, a company incorporated in Singapore and being a different corporate entity from the plaintiff advanced the defendant credit facilities amounting to RM500,000
- e** which the defendant accepted and utilised. On 18 November 1991 the same OCBC Singapore gave the defendant additional facilities amounting to RM1.1 million which again the defendant accepted and utilised. Subsequently the same OCBC Singapore further granted a revolving credit facility of a sum of RM5
- f** million. When the plaintiff bank gave facilities in October 1996 the additional facilities were as follows:

(a) overdraft (additional) 400,000

(b) LC Facility (new) 500,000

- g** 900,000

In January 1998 the plaintiff reduced the loan facility by a sum of RM2 million. This effectively meant that the loan facility available was solely the facility granted by OCBC Singapore.

- h** The plaintiff took out an O. 14 application for summary judgment and sought judgment for RM5,627,020. The learned senior assistant registrar entered judgment for the plaintiff on 8 August 2001 for the said sum. Being dissatisfied with that decision the defendant appealed. After hearing submissions I allowed the appeal with costs and fixed case management for
- i** 20 February 2002.

Findings Of The Court

Dato' Murthi, for the defendant, referred the court to the three letters of offer dated 18 February 1991, 18 November 1991 and 24 August 1995. The letters dated 18 February 1991 and 18 November 1991 were issued by OCBC Singapore.

In its affidavit in support of the summary judgment the plaintiff argued that it had a right to proceed with this action based on a vesting order dated 24 June 1994. The defendant's contention is that the said vesting order is *ultra vires* the Banking and Financial Institutions Act 1989 (Act 372) (the BAFIA). Section 49 of the BAFIA relates to the requirement of a sanction for the reconstruction of a licensed institution. The relevant section is reproduced for ease of reference. It reads as follows:

49. (1) No person shall enter into an agreement or arrangement –

- (a) which will result in a change in the control of a licensed institution or its holding company;
- (b) for the sale, disposal, or transfer howsoever, of the whole or any part of the business of a licensed institution;
- (c) for the amalgamation or merger of a licensed institution with any other person; or
- (d) for the reconstruction of a licensed institution, unless:
 - (A) the proposed agreement or arrangement is in writing; and
 - (B) all the parties thereto have first made an application in writing to the Minister for his approval of such agreement or arrangement and have obtained the Minister's approval thereto.

It seems to me clear that only if a licensed institution is the subject of a sale and disposal or transfer of its business, that the sanction of the Minister must be obtained. I have to consider whether the bank that granted the defendant the said facilities was licenced institution within the definition of s. 49(1)(b) of the BAFIA. Section 2 of the BAFIA defines a licenced institution as any institution licensed or deemed to be licensed under s. 6(4) of the same Act. Section 6(4) reads as follows:

6. (4) Upon receiving an application and the recommendation of the bank under this section, the Minister may grant the licence, with or without conditions, or refuse the licence.

The granting of a licence under s. 6(4) of the Act is no doubt subject to compliance with ss. 4 and 5 of the said Act. It is pertinent to reproduce s. 4 and s. 5(1) which read as follows:

- a* 4. No person shall carry on:
- (a) banking, finance company, merchant banking, or discount house business, unless it is a public company; or
 - (b) money-broking business, unless it is a corporation, and holds a valid licence granted under section 6(4) to carry on such business.
- b*

Section 5(1) reads as follows:

- (1) An application for a licence to carry on any of the businesses referred to in section 4 shall be made in writing to the Minister by submitting the application to the Bank together with the following:
- c*
- (a) a copy of the memorandum and articles of association or other constituent documents under which the applicant is established, duly verified by a statutory declaration made by a direction of the applicant.
- d*
- (b) a copy of the latest audited balance sheet of the applicant;
 - (c) a statement on the following:
 - (i) the name, place and date of the establishment of the applicant;
 - (ii) the names, places and dates of the establishment of its related corporations;
 - (iii) the sources of the applicant's funds, and the purposes for which and the manner in which they are utilised;
 - (iv) the principal business and field operations of the applicant and of its related corporations; and
 - (v) the names and addresses of the directors of the applicant and its related corporations, and of the substantial shareholders within the meaning section 69D of the Companies Act 1965, of the applicant and its related corporations; and
- e*
- f*
- g*
- (d) xxx

h It is now relevant to look at the provisions of s. 4(a) of the Act which states clearly that no entity can carry on banking business (as in this case) unless it is a public company. Again the interpretation section, that is s. 2 of the Act, defines company as having the meaning assigned thereto by the Companies Act 1965. Section 4 of the Companies Act 1965 (Act 125) defines a company as one that is incorporated pursuant to the Companies Act 1965 or pursuant to any corresponding previous enactment.

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Now the question as posed by the defendant is, can s. 49 of the BAFIA protect the Singapore incorporated bank. Whilst I'm tempted to make a decision, that issue is for the trial judge to decide. Suffice that at this stage I am satisfied, the defendant has raised a relevant triable issue.

Mr Ang, for the plaintiff, argued that since 1995 and after the vesting order, the defendant had been dealing with the plaintiff and utilising the facilities granted by the plaintiff. He submitted that the defendant had by conduct acknowledged that all the facilities utilised by them including those granted by OCBC Singapore were indeed maintained and managed by the plaintiff. In further support Mr Ang relied on s. 50(3) of the BAFIA which reads as follows:

50.(3) Where the order of the High Court under subsection (1) provides for the transfer of any property or business vested in or held by the transferor, either alone or jointly with any other person, then, by virtue of the order, that property or business shall, on and from the transfer date, become vested in or held by the transferee either alone or, as the case may be, jointly with such other person, and the order shall have effect according to its terms notwithstanding anything in any law or in any rule of law, and shall be binding on any person thereby affected, regardless that the person so affected is not a party to the proceedings under this section or any other related proceedings, or had no notice of the proceedings under this section or of other related proceedings.

To a question by the court as to whether he had applied to set aside the vesting order, counsel for the defendant referred the court to *Eu Finance Bhd v. Lim Yoke Foo* [1982] 2 MLJ 37 FC and to the words of Abdooldcader J (as he then was) sitting in the Federal Court at p. 39 which reads as follows:

Where a decision is null by reason of want of jurisdiction, it cannot be cured in any appellate proceedings; failure to take advantage of this somewhat futile remedy does not affect the nullity inherent in the challenged decision. The party affected by the decision may appeal ‘but he is not bound to (do so), because he is at liberty to treat the act as void’ [*Birmingham (Churchwardens and Overseers) v. Shaw* [1849] 10 QB 868-880; 116 ER 329, (at p. 880 per Denman CJ)].

As for the question of estoppel by conduct, it is set law that the doctrine of estoppel cannot be applied to an Act of Parliament. (See *Barrow's case* [1880] 14 Ch D 452 the judgment of Bacon VC as cited in *Veetak Enterprise Sdn Bhd v. Kuala Lumpur Finance Bhd* [1987] 1 MLJ 407 at p. 480).

In the final analysis, having heard submissions and having read all the authorities cited, I allowed the appeal with costs.